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The Jury and Criminal Responsibility in Anglo-American History

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Abstract Anglo-American theories of criminal responsibility require scholars to grapple with, inter alia, the relationship between the formal rule of law and the powers of the lay jury as well as two inherent ideas of freedom: freedom of the will and political liberty. Here, by way of canvassing my past work and prefiguring future work, I sketch some elements of the history of the Anglo-American jury and offer some glimpses of commentary on the interplay between the jury—particularly its application of conventional morality to criminal judgments—and the formal rule of law of the state. My central intent is to pose questions for further study (by myself and others) regarding the historical behavior of the jury, the jury's role in reinforcing notions of political liberty and free will, and, primarily, how scholarly conceptions of the jury's role and behavior have informed elite theory regarding the justifications for imposing criminal responsibility.

Keywords Criminal responsibility · Free will · Jury · Determinism · Conventional morality · Nullification

Introduction

This paper explores the complex relationship between conventional morality and the rule of law in Anglo-American history. Specifically, I address a difficult area of study concerning the interplay between conventional ideas of human freedom, particularly as embodied by jury decisions, and formal conceptions of criminal responsibility. The central

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ideas of freedom involved are beliefs about freedom of the will as well as notions of political liberty. The core difficulty of this area of study is one of substance that defines the issue itself: how, in Anglo-American history, have legal authorities and scholars recognized and resolved the problems posed by determinism for assigning criminal blame (based on presumably free action), while also upholding political liberty and maintaining the legitimacy of the law in the eyes of a citizenry committed to a belief in free will? The secondary difficulty is practical and lies in the method of study: commentary on this subject is sparse, particularly before the twentieth century, and the conventional views thought to underlie jury decisions are almost always a matter of inference. I have considered these subjects in past and immediately forthcoming work, but intend to give them more holistic attention in the future. Thus, I am largely concerned here with identifying areas of study and posing questions, rather than providing answers. I also aim to encourage work by others who share my view that the themes I stress represent an important aspect of the history of Anglo-American criminal justice administration, generally, and criminal responsibility in particular.

The central intent of this paper, then, is to begin the task of connecting the history of ideas regarding the criminal trial jury with the history of ideas regarding criminal responsibility.[1] The paper initially takes the form of a panoramic and generalizing commentary on the history of the criminal trial jury, which allows one to situate the institution in relation to ideas about political liberty and free will. The interplay of these two ideas has shaped our thinking about responsibility in general, as well as our thinking about how to resolve the free will question in particular, and nowhere has this interplay been more intense—and more determinative—than with respect to our thinking about the criminal trial jury. As this history reaches the era of the American jury, I turn my focus not just to the American side, but primarily to commentary of American legal scholars concerning the jury and its view of criminal responsibility in light of conventional ideas of freedom. I pose some questions regarding Americans' understanding of the jury during the first century of our national experience and, finally, restate—and reformulate as a running history—the role of the American jury in relation to ideas of freedom from 1900 at least to the 1970s, when "history" dissolves into present and a coherent account becomes, for now, a more doubtful prospect. But, first, by way of introduction, I want to provide some context for my approach by saying a bit about the kinds of questions that interest me most, about the relation of those questions to my past and forthcoming work, and about their relation to my ongoing scholarship.

[1] It is this connection that defines the terrain of my future work on criminal responsibility and its history. In order to make this connection at a number of points over the period 1200–2000, I shall, in effect, be bringing the jury—which was the focus of my earlier book, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Green 1985)—forward in time and over to the American side, while bringing criminal responsibility—the focus of my forthcoming book, *Freedom and Criminal Responsibility in American Legal Thought* (Green forthcoming)—back in time and over to the English side. Much of this paper is taken from an early draft of the forthcoming book, which had included an excursus on the jury from its inception in England in the early-thirteenth century through to the twentieth century United States, the latter period being the subject of the book itself. I removed the full excursus from later drafts of the book, where I have little to say about the jury by way of continuous narrative, but instead refer to the jury in numerous places where legal scholars brought it into view in their writings on responsibility. This tentative and generalizing paper revives the excursus and provides some of the missing continuous narrative. Because the paper's text in its original form assumed that the reader had just read the main body of the American responsibility book, I have adapted the text for this setting, adding explanatory matter where necessary and posing questions relating to the theme of this symposium. I have also identified some of the *dramatis personae* and their perspectives in footnotes.

My work has come at conventional morality[2] and the rule of law from two distinct angles rooted in the two ideas of freedom I have identified: political liberty and freedom of the will. My work on the English side, centered on the jury, mainly engaged political liberty, examining the jury as mediator (through its independent application or nullification of the official law) between formal legal rules and pervasive social attitudes about just deserts in criminal cases. I began in the medieval period with a legal-social history that attempted to reconstruct such pervasive attitudes in a limited sphere of criminal cases. Then I turned to something closer to intellectual history as I examined the writings of seventeenth and eighteenth century proponents and opponents of the jury independence embedded in the deep English past and ongoing—often with something like official acquiescence. One underlying theme of this earlier work can be expressed in terms of the range of answers that variously-situated commentators gave to the question of whether the rule of law could survive jury independence. Some commentators, who either accurately represented the de facto tradition of (relative) jury independence or romanticized it (often for polemical purposes) as a true "right" to find or nullify the law, claimed that the rule of law actually depended on a degree of jury independence that kept the law, as practiced, in line with social attitudes. Others, of course, instead took the view that such independence—a sheer de facto power—threatened the rule of law. Toward the end of the English jury book, I noted the way in which (in the eighteenth century) popular and elite ideas about free will interacted within the overall political liberty frame.

On the American side, I have explored mainly legal-academic ideas about criminal responsibility in light of the free will/determinism problem. In *Freedom and Criminal Responsibility*, I chronicle those ideas across the twentieth century from Progressive Era critiques of a free-will-based (and generally retributive) theory of responsibility in light of scientific determinism to the mid-century drift toward acceptance of the idea of free will as necessary to the criminal law as a kind of moral-legal rule that need not be in accord with scientific fact to late-in-century insistence upon the compatibility of scientific determinism (or "universal causation") with moral and legal responsibility, and, hence, to a modern version of the retributivism that the Progressives had attacked. I do not purport to establish the actual contours of conventional morality, but rather to portray scholars' assumptions about its nature as they looked over their shoulders at something that either repelled them, and that they sought to reform, or that they found they could comfortably live with and make use of in their theorizing regarding criminal responsibility.[3] Two of the central

[2] I use this phrase casually, but with some specificity. The phrase is itself conventional—see, e.g., H. L. A. Hart: "[I]t cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by conventional morality and ideas of particular social groups, and also by forms of enlightened moral criticism, urged by individuals whose moral horizon has transcended the morality currently accepted" (1961, p. 181). Especially on the American side, I use the term "conventional morality" with respect to the belief that human beings possess "free will" in the robust sense of a contra-causal (or, anyway, self-initiating) power that justifies the attribution of moral and legal blame. And I employ it in this fashion mainly in writing about the critical perspective toward this "popular" view occasionally found in the work of the legal scholars I treat. Most of those scholars considered their own skeptical position on free will more "enlightened" than that embedded in conventional morality. I myself do not privilege the scholarly view in my work, but take note of it as an historical fact. Moreover, I tend to think that this particular aspect of conventional morality is something of a universal; that is, I assume that even those scholars who most adamantly rejected the conventional understanding of human behavior, and who wrote and taught in line with that rejection, nonetheless unselfconsciously hewed to the conventional view in their everyday lives.

[3] My focus on elite views of conventional morality is worth emphasizing. My ongoing concern is historical Anglo-American thought about criminal responsibility, including thought about the jury's role in assigning responsibility in individual cases. Thus, although the history and (inferred, often obscure) perceptions of jurors themselves inform theory and are of obvious interest, my work is not intended as a definitive depiction

questions I pursue are: whether scholars thought the rule of law in the criminal context could survive elites' openly expressed doubts about the free will that they associated with conventional morality; and how worries that the rule of law could not survive such doubts shaped theorizing about criminal responsibility.

In this paper, I take a partial turn back to the jury. The dominant theme of the story of the criminal trial jury is that of political liberty. That is, of, roughly, both the power of the community via the jury to exercise a degree of independence when participating in the finding and/or application of the criminal law of the "state"—including by way of independent "nullifying" verdicts that rejected the formal law on a range of grounds—and the right of the defendant to call upon the conscience of his or her community during the trial process. Concerns with what I generally refer to as "free will"[4] play a role in the jury's exercise of its independence primarily in two, more subtle ways. On one hand, juries appear at times to have acquitted (or convicted of lesser offenses) individuals—who should have been deemed guilty as charged under the formal law—based on the jury's conclusion that, under particular circumstances, a defendant's act was not the product of a truly free will. Such instances of nullification—although rare compared with other reasons underlying nullification—illustrate that, to some extent, conventional morality itself recognized constraints on free will that went beyond traditional legal excuses, such as insanity or duress. On the other hand, the conventional morality of the jury is generally thought to reinforce a belief in freedom of the will exercised by most people, most of the time. And this belief is thought to coincide with the jury's tendency to conceive of criminal conviction in retributivist terms. Thus, it was comparably rare for the jury's recognition of constraints on free will to enter as a challenge to the rule of law through acquittal; more often, the jury played a conservative role by holding in place the law's free-will-based retributivist premises.

Overall the nature of this overlap between political liberty and ideas of free will—as well as of the relationship of both ideas of freedom to ideas about criminal responsibility generally—is no simple matter and presents ongoing challenges to any attempt to present a clear view of the history involved. As yet, I have done little to suggest how the free will issue fits into the English story, and doing so poses a particular problem for the period preceding the seventeenth and eighteenth centuries: only then did sources finally reveal what might have been a longstanding, commonplace and socially broad-based distinction between, on the one hand, thought and action flowing from and reflecting one's "true self" and, on the other, thought and action induced by forces (e.g., liquor, sudden rage, starvation) not emanating from, or reflective of, the "true self"; at the same time, only then did learned juristic commentary turn more directly (and in more modern terms) to the classic free will/determinism problem. Thus, although I have already given some attention, in my

Footnote 3 continued
of the hearts and minds of jurors over time. Rather, my inquiry centers on legal authorities' and commentators' understandings of—and justifications for or criticisms of—historical judgments of responsibility embedded in the formal law as well as their perceptions of jury decisions arising from or reacting to the formal law.

[4] Importantly, I use the term "free will" here somewhat loosely in reference to jury decisions that appear to recognize constraints on the individual will of the accused for which he or she should not be held fully responsible. I do not mean to suggest that jurors typically conceived of these constraints in modern or scientific/behavioral terms of the absence of "free will." Rather, such decisions represent a range of juror perceptions and conclusions about the offender's constrained circumstances. Most distinctively, the jury behavior that I place in this category is distinguishable from decisions that the offender was constrained due to true insanity or, at the other end of the spectrum, should not be punished (for a range of reasons), although he or she "freely" chose to commit the crime.

American-side work, at least from 1900 on, to questions about the interaction over time of ideas regarding political liberty and those regarding free will, these questions still need focused study aimed at earlier English history. Further, the modern American jury story presents its own complications. For example, the historian might rightly conclude that jury nullification, based on perceived constraints on the defendant's free will, has increased over time alongside growing social and scientific understandings of constraints on free will; one thus might speculate that such nullification, which implicates both ideas of freedom, suggests that conventional, largely free-will-based views were becoming more in line with elite, increasingly scientific determinist views. Yet modern (i.e., twentieth-century) elite criticism of the jury complicates the picture: as I suggest in *Freedom and Criminal Responsibility,* even if modern juries were relatively more sensitive to constraints on free will in individual cases, and if increasingly deterministic, free-will-denying elite theory had reason to embrace this fact, elites also may well have perceived the jury's ad hoc, limited attention to constraints on free will as problematic because it *overall* reinforced the link between criminal responsibility and the presence of true free will. All this is to say that some lack of clarity on these matters is to be expected and, indeed, it defines the terrain: at issue here is ongoing historical work on the Anglo-American jury and whether sources (and actual conditions, for that matter) allow one to keep the interaction of political liberty and responsibility—including ideas about human free will—always in view.

1.

From its inception in the early-thirteenth century, the criminal trial jury possessed the de facto power to exercise a significant degree of discretion, and it employed that discretion especially in cases involving likely recourse to the death penalty. In form, the jury employed its discretion in weighing the evidence bearing on whether the defendant had, in fact, committed a specific capital offense. In substance, an acquittal might reflect any one or more reasons for not condemning to death a defendant who the jury nonetheless thought had committed the act underlying the charged offense. These verdicts ran the spectrum from application of the law (the jury believed, e.g., that the particular taking of property or the homicide was not truly felonious in the way the law intended) to rejection of what the jury believed was too harsh a sanction (the jury believed the defendant committed the specified offense but, in justice, did not deserve to die) to straightforward favoritism or bribery, local resistance to central justice, or an interest in preserving a member of the community's contribution to the labor force. Judicial acquiescence in nullifying verdicts probably reflected a variety of perspectives:[5] that the broad and largely exhortatory law was meant to be applied selectively to condemn only the worst offenders,[6] the "worst"

[5] Nullification (and official acquiescence to the practice) existed alongside significantly higher numbers of jury convictions in especially heinous cases of homicide or theft. As I suggest in *Verdict According to Conscience* (1985), the reliability of jury condemnation in serious cases likely rendered jury independence (or potential independence, as it certainly was not always clear whether a verdict was the result of nullification or of the jurors' genuine belief that inculpating evidence was lacking) less provocative from the judicial perspective, thus creating less pressing need for judicial intervention.

[6] The many as-yet-unanswered questions about the origins of the jury's discretion include whether the blanket capital sanction for felony was merely exhortatory from the very outset and, if so, which officials or social processes were intended to determine when the ultimate sanction would be carried out and when not. Then, when the trial jury subsequently replaced the ordeal, to what extent did crown and bench assume that the jury would exercise discretion with regard to imposition of the capital sanction? Whitman's argument (2008) that jurors were under powerful constraint derived from theological strictures against wrongful

being defined in terms of some combination of the circumstances of the act and the character—or nature of the intent—of the offender; that the best test of the evidence of act and of mind (including the "evidence" of reputation or character) was local assessment of testimony over the course of a process that included pre-trial as well as trial-based charges, claims and counter-claims; that, as a practical matter, centralized (royal) institutions of criminal justice could go only so far in overriding local prejudices and interests.

The evolution of jury-based discretion in the administration of criminal law witnessed the effects over time of increasing constraints on the jury, occasional resistance to those constraints by elite publicists and recalcitrant jurors, and a gradual adjustment between official interests and jurors' attitudes. This adjustment was facilitated, from the sixteenth century forward, by legislation distinguishing clergiable from non-clergiable offenses—principally, the grading of homicide offenses (creating the murder/manslaughter division)—a development that itself (in my view) paid homage to the longstanding realities imposed by the use of a jury. On this reading, practical realities (and perhaps pervasive social ideas regarding substantive justice) had come to inform official definitions of justice. In turn, the (partial) capture of conventional notions by the bench and legislature might have produced, by the eighteenth century, an even more constrained field of lay participation, but, if so, that in itself does not indicate (far from it) that widespread social attitudes regarding just deserts were less influential on—and within—the law. Legal authorities certainly also pressed their advantage in accordance with their own interests, and found little resistance regarding the most heinous offenses but, of course, they still encountered occasional stark resistance with regard to so-called "political" offenses. Further, where the jury did *not* resist in such cases, legal authorities were sometimes attacked for corrupting the jury process through unlawful vetting. Yet again, prospective jurors themselves were implored in political broadsheets not to allow the bench to subvert the true law or the Englishman's right and duty, as juror, to determine that law.

Although this articulation of the jury's "right" to determine law as well as fact, which blossomed in the seventeenth century, was aimed mainly at political cases, it sometimes also touched the matter of determining life or death in more routine felonies. With respect to political cases, invocation of a law-finding right amounted to an assertion that the jury had a duty to reject judicial rulings that it deemed contrary to good law—what we might call true law finding. This was the paradigmatic example of political-liberty-based resistance to authority. In common-run felonies, however, law finding typically meant something less: the jury had the right to apply the law as the judge stated it, but in such a way as to do justice, as the jury understood it. Thus, for the most part, law finding in routine cases involved a more modest form of nullification, often a fictive finding of guilt only on a lesser charge that reduced the penalty that the defendant could suffer. The late-seventeenth and eighteenth century English bench sometimes openly encouraged juries in this behavior, which enforced age-old notions of justice long-since co-opted, in large part, by the bench and applied in tandem by judge and jury. From one perspective, this latter form of "law finding" was *within* the law—as that law was understood by the bench (here political liberty signaled not

Footnote 6 continued
capital conviction of the innocent might well bear relation to the last question. At the least, it presupposes authorities assumed jurors would err on the side of caution in exercising a responsibility judges were themselves loath to undertake.

resistance, but mere participation)[7]—unlike true law finding in political cases, which presumed a rejection of judicial mandate. From another perspective, however, the bench might have viewed the modest discretion exercised in the routine-felony context as inappropriate or unwise even as it acquiesced in this practice by which juries gave vent to community-based ideas of justice.[8]

In some eighteenth century cases, jurors seem to have reacted to constraints upon the defendant—matters of internal or external causation, as commonly understood. Here the concern with what one might call limitations upon "free will" entered as a subset of the larger political liberty theme. Though this concern with constraints in relation to intent and will was probably age-old, one senses that, at least by the eighteenth century, the phenomenon of granting merciful verdicts due to social or psychological constraints had become part of routine courtroom practice. The system of gradation of offenses, as it developed over the early-modern period—and especially the specific statutory divisions between capital and merely transportable offenses—created more space for such sorting out of guilty offenders. The bench might have thought a defendant's good reputation the more appropriate basis for mercy, but juries apparently bestowed mercy—in the form of a lesser verdict—for lapses of capacity thought to be caused by forces beyond the actor's control and yet that lay well outside the narrow limits of legal excuse.[9] That, at least, is what some contemporary legal and lay commentators thought, and they were quick to see the various implications of this essentially deterministic thinking.[10] The reform of the law of sanctions in early Victorian England might have owed something to fears about the effect of such thinking on the underlying concept of criminal responsibility. In any event, once the law of sanctions had been reformed (greatly reducing the scope of capital felony), recourse by English juries to considerations of non-legally-recognized levels of social and psychological constraint substantially diminished (though it far from entirely disappeared). In short, by removing an incentive for the jury to consider the degree to which the defendant had acted out of his or her free will, authorities lessened the resistance registered by juries as an aspect of political liberty. The historian might also conclude that this illustrates the limits that longstanding, broad-based social views regarding capital and non-capital offenses effectively imposed on the formal law, which, once again, came to terms with those views by absorbing them.[11]

[7] Bellamy (1998) applies this idea more broadly, arguing that, from the middle ages, apparent judicial acquiescence in jury independence illustrated that juries should not be said to have nullified the law, but that judge and jury should be described as having reached consensus as to results in particular cases that fell outside legal rules as formally expressed.

[8] There is now a substantial literature on the eighteenth century criminal trial, including a variety of perspectives on judge/jury relations. On jury composition—wealth, status, social attitudes—see Cockburn and Green (1988), esp. the essays by John Beattie, Peter King and Douglas Hay, Chaps. 8–10. See also Langbein (2003) and sources cited therein for a pioneering account of the development of adversary criminal trial.

[9] Again, jury-based assessment of reputation and character doubtless influenced determinations of lack of—or possession of—full capacity.

[10] Dana Rabin (2004, Chap. 3) discusses patterns of defendants' and witnesses' exculpatory language, noting that we are unable to determine the impact of such language in particular cases. I note eighteenth century elite commentary reflecting the view that juries sometimes seized on such ideas (Green 1985, Chap. 7). Also see below, note 30.

[11] I have not yet undertaken systematic research on nineteenth and twentieth century English developments. Norrie (1993) and Lacey (2001), among others, have pointed to the increased juridical focus in British law on the mental element of criminal behavior from the late-eighteenth century forward. In part, this juridical move has been seen as emblematic of the concerns within an emerging capitalist order to maintain legal focus on the individual and to exclude broader social causes from the consideration of criminal responsibility. Further work is needed on how this development affected official and scholarly commentary on the

2.

It is too early to detail—too little historical research has yet been undertaken—contemporary theorizing about the actual behavior of American juries from the colonial period to the mid-nineteenth century. We know most about contemporaries' recognition of jury nullification in political cases, especially where juries registered resistance to English hegemony before the Revolution. In this context, Americans often endorsed the criminal trial jury's "right" to "find law"—frequently drawing upon the English nullification tradition—despite the fact that this was official law in few places. It would be rash to automatically read references to the American jury right to find law in any literal sense. The "right" can be found in the writings of some leading Founders of the new republic, but it is often difficult to determine whether it meant much more than the traditional (and dispositive) right of the jury to apply the law, as stated by the bench, to the facts it had found. Early-nineteenth century Americans sometimes seemed befuddled by the language of the "jury right," and often divided on the meaning of that "right." Some accorded it a broad meaning, some a narrow one (in both cases relative to the political-liberty paradigm)—and this remained true over the many decades it took for most states to root out the offending, true-law-finding right from their constitutions, legislation, or common law.[12] Above all, the political-liberty basis of the jury-right foundered on the construction of theories of legitimacy of state authority, including positivist conceptions of the law, and on an increasing (post natural law) view of the jury as a less democratic source of law than the legislature.[13] What was left were the criminal trial jury's rights merely to apply the law as stated by the bench and to finality in criminal cases ending in acquittal. The latter, of course, undergirded the de facto power of nullification—and with it a residue of extra-legal claim to a right to "find law" (at least in favor of the defendant).

The regime of capital punishment in colonial and early-national America differed greatly from that in England. Americans mainly reserved that dire sanction for relatively few cases and it thus never produced the systemic pressures for nullification that typified the English experience over some seven centuries. On the other hand, Americans regularly registered resistance to formal state authority and, so far as we can tell, reflected through jury verdicts substantial local independence (Nelson 2010). It is impossible to determine how much this particular manifestation of political liberty translated, in the minds of jurors, into independent fact-finding and how much it translated into conscious nullification along the lines of the original English practice. In truth, there was no unified American history of jury behavior; there were, rather, many different histories relative to specific times and places.

By the 1870s there was a substantial literature of criticism of the criminal trial jury, especially in the rapidly-increasing number of law journals, but not emanating solely from the upper reaches of the legal establishment. What seems to be the case is that juries were

Footnote 11 continued
appropriate role of the jury and on actual jury behavior. Other nineteenth and early-twentieth century English developments roughly parallel, while interestingly diverging from, those in the U.S. (Wiener 1990; Garland 1985).

[12] Krauss (1998) and Nelson (2010), among others, shed retrospective light on—and describe outstanding questions concerning—the nature, official status, and exercise of the jury right in the colonial period. Howe (1939) offered a comprehensive account of the demise of the law-finding doctrine through the nineteenth century.

[13] Particularly influential were the judicial opinions of Justice Story (sitting as a trial judge) in *United States v. Battiste* (1835), and of Chief Justice Lemuel Shaw in *Commonwealth v. Porter* (Mass. 1846), asserting that the jury was bound to accept the law, as given to it by the presiding judge.

widely thought to nullify the law due either to "sentiment" or "sympathy" and the like or to community-based standards of behavior, the sort of thing that drove Roscoe Pound'round the bend.[14] Pound's early-twentieth century gloss upon these practices suggests he mainly attributed them to what he took to be America's ongoing "pioneer" spirit (Pound 1930, pp. 198–199)—that they had more to do with a misplaced affirmation of political liberty than with denial of free will. Pound nonetheless understood that doubts about the latter, in particular cases, sometimes generated community-based manifestations of the former. With regard to juries' treatment of legal insanity, Pound (1911, pp. xvi–xvii) extended a line of criticism that runs back to Twain's nineteenth century mocking of the "insanity dodge" in unwritten-law cases (Twain 1870/1875). Here, again, commentators understood the jury behavior in question largely in terms of the local community's manipulation of legal doctrine to allow for the defense of "honor," despite the state's claims to preclude it and thus as having as much to do with a form of political liberty as with jury-based notions of social or psychological constraint.[15]

It is puzzling that even this limited notice of the jury's attention to social and psychological constraints (outside of cases involving legal insanity per se) did not often appear in nineteenth century writings before the later decades of the century. Does this mean that, before then, juries gave relatively little conscious thought to such factors? Did they always—or mostly—translate doubts about a particular defendant's free will into doubts about whether the defendant had acted with the requisite legal intent, without—as they understood the matter—departing from the actual standards of the law? The late-nineteenth century legal commentary on this point seems unlikely to have revealed forms of jury behavior that were, in fact, new. Rather, that commentary probably reflected juristic concerns that the non-legal scientific positivist writings of the day (which challenged common conceptions of free will) brought to the fore, giving age-old practices new meaning and importance. Jury acquittals that resulted from ad hoc attention to (imagined or real) social or psychological constraints might well have been common from the outset of the American experience but, if so, as in England they were understood as responses to aberrational displays of human behavior and not taken to reflect a weakening of widespread belief in a nearly universal freedom of will.

Certainly by the twentieth century, the (secular) deterministic thought registered in medical-legal jurisprudence across the nineteenth century (mainly in relation to the legal insanity defense) had become popularized through the media of the day to the extent that it might have affected the consciousness of the classes that composed criminal trial juries. Writing early in the twentieth century, Gino Speranza hopefully opined that juries sometimes brought a consciousness about social constraints to their resolutions of theft cases.[16] That was in his imagination, and though it probably reflects a kind of reality, that

[14] I am currently exploring this literature with an eye to the underlying meanings of juror recourse to sympathy or sentiment.

[15] Hartog (1997) provides vivid examples from the mid-nineteenth century of the way lawyers played upon jurors' understanding of weakness of will or incapacity for self-control due to emotional states in unwritten-law cases. This likely occurred in other kinds of criminal cases even earlier in the century, as Susanna Blumenthal (forthcoming) shows it certainly did in a wide range of civil cases. Blumenthal's path-breaking study suggests the need for comparative analysis of the civil and criminal contexts with regard to the nature and prevalence of ideas about legal insanity and lesser forms of mental weakness.

[16] Speranza, an American lawyer of Italian heritage, gave lengthy consideration early in his career to the differing perspectives on free will of the American legal system and the behavioral sciences. Optimistic that some marriage of the two was eventually possible, he posited that some juries were ahead of the written law in this regard by considering the original causes of a particular crime, including social conditions or upbringing (e.g., Speranza 1903, p. 516).

reality in no way implies that jurors possessed the more systemic doubts about free will that plagued Speranza.

Indeed, the developing school of behavioral science-based criminal jurisprudence (part of a fairly general western movement)—which privileged the notion of general determinism and thus challenged traditional notions of free will and desert—might well have produced a very different perspective on the jury from that of earlier times. Historians of the jury must now investigate whether nullification was becoming a sub-theme, that is, whether scientific positivists noted it but deemed it both too ad hoc and unprofessional to be trustworthy or—worse—a kind of release mechanism that gave convictions based on a belief in free will a greater degree of legitimacy. It would not be surprising to find that much elite criticism of the jury was directed at its retributive nature, not its tendency to express political resistance or, in more routine felony cases, to be prone to "unwise" sympathy or simple mercy due to the defendant's straitened circumstances. My hypothesis is that without insisting upon a particular moment for this change, the historian can identify a new orientation emerging in the relationship between ideas about criminal responsibility and ideas about the criminal trial jury. Even traditional consequentialist-utilitarian orientations toward law—centered on preventing future harm through deterrence (as opposed to consequentialism centered on reform of the offender)—had been able to subsume the law's retributivist elements, which themselves contributed to the overall good through their effect on individuals: society, as represented by the jury, was thought to achieve expiation through criminal condemnation, while retributive blame and punishment deterred future offenses. But the reform-based tenets of the scientific positivist movement—as those ideas gathered force—were bound to collide directly with the jury's conventional, desert-based mode of judgment and the law's traditional, jury-informed acceptance of retributivism.

3.

As of the Progressive Era, then, the elite juristic critique of free will—and of the personal desert and punishment it was thought to justify—was aimed at a criminal law that juries generally applied on the law's own intended terms, though, as ever, with occasional ad hoc attention ("selective determinism") to social and psychological constraints on particular defendants. By then, too, most scholarly commentators assumed a disjunction between their own and popular understandings of the nature of human behavior. Elite writers—particularly those on the reform side of consequentialism—understood the jury as typically reflecting a popular ethic of free will, which they saw as the linchpin of the traditional and, for the present, unreformable common-law assessment of guilt. They focused their reform efforts on the domain of penology, accepting, often unhappily, that their limited reach extended only to the sentencing process. This recognition of the bifurcation of criminal process (between guilt assessment and sentencing) became, as I argue in *Freedom and Criminal Responsibility*, an important conditioning feature of twentieth century academic criminal jurisprudence.

I emphasize the relationship of this bifurcation to criticism of the jury in the early-twentieth century scientific positivist era. But I suggest as well the manner in which some reform-oriented writers enlisted the jury as an ally. William A. White and Sheldon Glueck

sometimes portrayed the jury as fumbling its way toward identification with the defendant, as subconsciously adopting his perspective and mediating between the law and the realities of human behavior with beneficial results.[17] The early Jerome Hall reflected a more mundane optimism about the gradual enlightenment of the criminal law, including jury assessment of responsibility.[18] Others remained skeptical, at best, conceding the role, or, at least, the constitutional recognition, of the jury with respect to political liberty but otherwise viewing the institution as a significant part of the problem, rather than a means to its solution.

The criminal trial jury saw a reversal of fortune (albeit gradual and only partial) in mid-twentieth century America. Explanations for this shift mainly lie beyond the scope of *Freedom and Criminal Responsibility*, but I would suggest here that the reaffirmation of the criminal trial jury arose from many of the same developments that lay behind the rekindling of ideas regarding human freedom in the post-World War II period: the repudiation of ideas and practices associated with authoritarian regimes abroad, including statist applications of scientific positivism in various phases of criminal (and civil) justice administration; certain strands of American "consensus" thought that rediscovered democratic virtues in institutional practices that lacked formal rationality and were seen to countervail strong statist tendencies precisely by drawing upon widespread, informal community intuitions and settled judgments; the focus on the rights of criminal defendants within a larger constellation of citizens' rights, so balancing those of victim, offender, and society at large. The broader study of the mid-century freedom issue that I envision (whether undertaken by myself or others) will take account of these, and other, developments and will thus transform and eclipse the particular internal legal-intellectual story told in *Freedom and Criminal Responsibility*. Yet the internal legal-intellectual story remains germane to my future work.

In *Freedom and Criminal Responsibility*, I hint at Herbert Wechsler's elusive and grudging conception of the jury's role in his early-1950s views regarding what he termed "the jury's sense of justice." Whereas Wechsler and Jerome Michael, representing the deterrence-based utilitarian school, had opined in 1937 that the jury should someday give way in insanity cases to a panel of experts (e.g., p. 757), Wechsler's 1955 commentary on the Model Penal Code Tentative Draft's Responsibility section[19]—fully accepting the permanence of the jury—bespoke a less certain view of a less certain future. In 1952, Wechsler had openly recognized the limits that the "retaliatory passions" set to application of a utilitarian theory of criminal justice (1952, p. 1105). Three years later, he glossed the Code's insanity defense in

[17] White, a psychiatrist, would have preferred a panel of experts over a jury in legal insanity cases (a view shared by some other in the late-nineteenth and earlier-twentieth centuries) but, in acknowledging the jury's constitutional role, recognized jurors' potential for importing a more holistic view of the actor's motivations and circumstances into otherwise overly static or artificial legal rules (e.g., White 1923, pp. 209–210). Glueck, both a behavioral scientist and a Harvard Law professor, discussed criminal responsibility in terms of its roots in group psychology, which jurors naturally employed in making judgments (Glueck 1925).

[18] Hall's early legal scholarship acknowledged that the community's sense of justice could both lead and hamper legal reform (e.g., Hall 1935). Although he advocated positivist reform, he emphasized the jury's historically central role and believed that jurors' understandings of the causes of crime could be enlightened over time.

[19] As a central drafter of the American Law Institute's (ALI) Model Penal Code (formally promulgated in 1962), Columbia Law's Herbert Wechsler fashioned a flexible version of the traditional tests for insanity. The draft section on "Mental Disease or Defect Excluding Responsibility," which ultimately received Wechsler's support as a matter of compromise, precluded responsibility for one who, "as a result of mental disease or defect … lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." (Model Penal Code § 4.01: Tentative draft no. 4, p. 27.)

terms of "the jury's sense of justice" (Model Penal Code: Tentative draft no. 4, p. 159), implicitly acquiescing to the idea of free will that underlay and popularly rationalized such social justice in an apparent compromise that would inevitably open any acceptable Code language regarding responsibility to a double meaning—that language would invoke both popular retributivism and "official" consequentialism. Thus, although the jury's place was secured, judicial and jury-based perspectives would differ; the Code, on this reading, institutionalized disjunction between elite and lay understandings. For Wechsler, of course, Judge David Bazelon's remedy—the test for legal insanity famously described in *Durham v. United States* (1954), according to which the jury would hear a broad range of expert testimony and then determine whether the defendant's act was the product of mental disease or defect[20]—went significantly too far. Nevertheless, even for Wechsler, the jury would have its say. This backing into an acceptance of the jury's ultimate power, whatever it might portend in practice, was, to Wechsler's mind, justified by his sense of the limits the "retaliatory passions" imposed on unwise mercy—although he thought juries could be led to register unwise acquittals by reason of insanity, he also knew their more natural inclination led them to err in the opposite direction: the jury was as often restrictive as it was unconstraining. Pacts with the devil come in a variety of forms; the invocation of social justice had no single meaning.[21]

[20] In *Durham*, Bazelon (heir to the reformist tradition within consequentialism) substituted the "product of mental disease or defect" test for the *M'Naghten* and irresistible impulse tests in the U.S. Court of Appeals, D.C. Circuit. Under Bazelon's test, medical experts' testimony would not be constrained by the legal determinants of the traditional tests, but would address all symptoms that the experts deemed relevant to whether the act with which the defendant had been charged was a "product" of mental disease or defect. Wechsler deemed the product test too open-ended with respect to causation and likely to lead to overbreadth in jurors' understanding of exculpatory conditions. In 1972 the D.C. Circuit abandoned the product test and adopted the ALI test (*United States v. Brawner* 1972). For discussions of Bazelon's opinion, see Green (2010 and forthcoming).

[21] The point I am making here is that, for Wechsler, the appropriate basis for responsibility was whether the defendant had possessed a capacity to be deterred by the law, not whether he possessed "free will." The ALI test fell far short of this strict deterrence-based principle. It conceded that jurors would apply their own sense of justice rooted in conventional morality, but was shaped, or so Wechsler thought, in such a way that outcomes would more closely approximate those that a strict deterrability test would achieve as compared to any other test that the drafters and the ALI as a whole would accept. The "retaliatory passions" that law could not ignore would lead to results akin to those a strict deterrability test would produce, not only in insanity cases, but more generally.

Bazelon had a very different view of the relationship between responsibility and the appropriate role of the jury. His opinion, in *Durham*, insisted not only that jurors should hear all of the evidence that the psychiatric experts deemed relevant to the defendant's state of mind, but also, in a kind of coda to the opinion, that it was ultimately the jury that had to resolve whether, on that evidence, the defendant possessed the free will required under the criminal law. Unsurprisingly, most contemporary commentators ignored the coda, treating it as mere formula. Although they well understood that jurors would hear a wider range of evidence, they mainly saw this in relation to what they thought either good or bad about the crux of the opinion: that it increased the psychiatrists' sway in insanity cases, made the legal determination of insanity more "scientific." It is risky to read back into the opinion what Bazelon said more than a decade later, but he appears to have taken the juror's special role quite seriously. He explained that he had hoped the *Durham* rule would educate juries regarding more "sophisticated concepts" of free will and he made clear how limited he believed actual free will was for most offenders, given the social conditions that bore influence on their behavior (Bazelon 1976, p. 391). Bazelon's subsequent gloss united *Durham* with his thinking more broadly, which extended well beyond psychiatric matters and bore fruit in his famously proposed (but never adopted) "rotten social background" test (see *United States v. Alexander* 1973, pp. 957–965; Delgado 1985). There is no evidence that Bazelon rejected the notion of free will as a general matter; rather, he appears to have viewed it as quite limited and especially so with respect to most criminal offenders. He well recognized how difficult it was to draw the line between free and unfree, and considered this a moral issue best played out publicly, via jury trial. Given society's at least partial responsibility for the conditions that had much to do with criminal behavior, it was especially important for society—via the jury—to take

Wilber Katz, Warren Hill and Thomas Szasz, among others in the 1950s and early 1960s, invoked jury-based resolution, but with differing ideas in mind. Katz and Szasz expressed different conceptions of the taking of responsibility; neither discussed the jury, apart from the ritual of taking responsibility, and both might be taken to have justified recourse to that institution only in light of the specific ends they sought to affirm.[22] Hill, like Bazelon, saw the jury in relation to the education of the public, so he married scientific positivism with an evolving, ever more enlightened form of social justice, and thus also justified the institution as a form of "adult education," even as he sought to transform the substantive justice it rendered.[23] Terms of adjustment need not be read as terms of endearment and, no doubt, mid-century commentators possessed differing degrees of warmth for the institution of trial by jury. But the commonplace critiques of the jury of the preceding decades had largely disappeared and justifications for the institution—full-blooded, tepid or strictly *faute de mieux*—abounded.

The good fortunes of the criminal trial jury hardly diminished during the ensuing decades, which saw a broad scale return to ideas centered on desert among academics. Further, as a parallel but largely separate phenomenon, from the mid-1960s forward, political rhetoric increasingly framed social justice in retributivist terms, as positions geared toward personal responsibility and tough-on-crime measures ultimately appeared at both ends of the political spectrum. For various (and, indeed, sometimes opposed) underlying reasons, sentencing and penological policy also drifted away from the rehabilitative ideal that was, in part, associated with a more scientific—and, it was presumed, less retributive or socially conventional—view of criminal responsibility. Incarceration rates rose dramatically and fixed, sometimes mandatory, and often explicitly punitive sentences became the norm. Thus, by the 1980s and 1990s, political and penological trends seemed to dovetail with an academic re-emphasis on desert-based criminal responsibility. I suggest, in *Freedom and Criminal Responsibility*, that the turn to neo-retributivism[24]—based on ideas that largely pre-dated the shift in real-world practices and that evolved

Footnote 21 continued
responsibility for drawing the necessary line for each defendant after frankly confronting the fullest possible account of his state of mind and the social conditions that bore upon him.

[22] Katz, a Chicago Law professor, affirmed the importance of ascribing/accepting criminal responsibility even as he questioned the ultimate reality of free choice, positing that "[m]an's ultimate freedom is his capacity to assume moral responsibility" (1953, pp. 278). Szasz, a psychiatrist, criticized the integration of behavioral science and law, emphasizing that law is an entirely separate sphere, where our abilities to choose and to bear responsibility must remain central tenets in order for the legal system to carry out its functions—which included defending individual liberty and assuaging, through the jury trial process, feelings of guilt that unavoidably accompany ascriptions of responsibility (1956, 1963).

[23] Ohio State Law professor, Warren P. Hill, embraced the notion that crime was ultimately most comparable to—and should be treated like—disease. But, for the time being, a functioning justice system was bound to honor juries' notions of free will which, through the trial process, allowed for venting of instinctual aggression and reinforced law-abidingness. In turn, Hill suggested (in endorsing Bazelon's opinion in *Durham*) jurors might learn from more expansive psychiatric testimony the vital lesson that human behavior was sufficiently complex that they should (here turning Bazelon's view on its head) withhold judgment and leave the matter to experts (Hill 1955).

[24] I use the term "neo-retributivism" to distinguish modern American (post-1960s) legal academics' retributivist thought, premised on ideas about dignity, autonomy and one's deserving to be thought about as a responsible person, from an earlier retributivism that most legal scholars (and society at large) associated with revenge. Of course, true retributivism is generally thought to have always been premised on the positive ideas that I have listed and revenge-based retributivism to be a perversion of the real thing. Some would therefore prefer that I use "retributivism" where I have used "neo-retributivism" and "faux-retributivism" where I have used "retributivism.".

alongside, but certainly not as a simple result of, that shift—had its own distinct theoretical roots and character. But desert-oriented theory among scholars complemented the more practical shifts, at least facially, such that an assumed conventional morality—and the jury with it—seemed to gain legitimacy from all sides. Neo-retributivism virtually assumed a background of jury-based determination of guilt—albeit one that most defendants had long since readily waived[25]—in a way that both scientific positivism and strict utilitarianism did not.

The scholarly conversation of the late-twentieth century neo-retributivist decades was rich and searching, as much an exercise in humanistic discourse regarding freedom and responsibility as a practical assessment of the best legal policy. The numerous strands of this discussion oriented themselves to the free will question in differing ways. For some, that question was simply irrelevant; for others, it was central and puzzling. For few, it would appear, was it totally debilitating. And this despite the fact that, in law—as in life—free will remained a mystery, not merely in the sense of something to be solved, but also in the sense of something generally assumed to be beyond solution. A significant branch of 1980s and 1990s neo-retributivism—Moore (1985) and Morse (1986, 1998) are representative—drew on formal philosophical compatibilism; it asserted that determinism/universal causation should be assumed to be true as a basic scientific matter, but meaningful responsibility exists and can be evaluated in a separate sphere rooted in our ability to reason, our social relations, and our personhood. Thus Morse's formulation, for example, asserted that the criteria for responsibility—the capacity for rationality and the absence of legally relevant hard choice (or compulsion)—are fundamentally moral/social/political issues justified in internal, normative terms underpinned by the "folk-psychological," common-sense notion that humans act on the basis of reasons (e.g., 1998, p. 338). Accordingly, he advocated that the jury, as the community's representative, should make case-by-case determinations concerning the bounds of legal culpability based on common sense—albeit constrained by legal definitions of insanity or other non-culpable circumstances enacted by legislatures, which are the more comprehensive representatives of the community. In other words, the jury plays an important "moral" role in identifying the boundaries of the capacity for rationality and absence of legally relevant hard choice (the "true" conditions of responsibility-bearingness in a determined world), these being supposed to mirror the deeply-held notion of responsibility embedded in conventional morality (as per folk psychology).

Many other neo-retributivists expressed doubts or agnosticism about philosophical compatibilism and instead adhered to some version of a more informal desert theory. It is difficult to generalize about these scholars beyond saying that they typically premised

[25] Significantly, by the end of the twentieth century—albeit continuing a trend that began rising even before 1900—the vast majority of criminal cases were resolved by guilty plea. Such admissions of guilt were accepted, for reasons of efficiency and justice, as determinative, despite the fundamental questions that might have been raised. This acceptance—or, perhaps better, acquiescence—is a matter of inference: criminal jurisprudence scholars typically did not speak to the point. And when there were objections to the guilty plea, they were usually couched in overall free-will-affirming language: the particular defendant was portrayed as unable, under the circumstances, to make a truly free decision. Criticism generally was not rooted in a determinism-based complaint that the defendant, like all humans in all circumstances, was able to think and act freely in only a conventional, but philosophically naïve (and not, in fact, true) sense. Thus, the critique of plea bargains reinforced, rather than challenged, conventional assumptions about human autonomy. Although the remaining cases actually resolved by jury (or bench) trial formed a small minority, the trial still embodied, for many legal scholars, the reigning, ultimately definitive paradigm for resolving criminal cases.

desert on arguments directly from notions of justice, and respect for dignity, autonomy and the attributes of the person, and, often, the imperatives of political liberty (all features to which formal compatibilists also appealed but over and beyond philosophical argument for compatibilism). Essentially, they stated one or another form of the view that law rightly (or, anyway inevitably) proceeds on the commonly held presumption of individual capacity for responsibility and the assumption (about which they themselves expressed some doubts) that humans are, in most instances, truly free agents.

Whatever the disjunction between the perspective on freedom in most neo-retributivist thought and that (as neo-retributivist scholars imagined) embedded in conventional morality, social statement—we might speculate—could nonetheless be translated into elite theory. That is, the presumed basis for the jury's assessment of guilt (i.e., a background assumption of *actual* free will) could be indulged as a necessary predicate by those who deemed the *idea* of free will—or of responsibility-bearing choice—inevitable, appropriate and just. If social justice could be re-read in terms of utility, it could also be re-read in accordance with the principles of neo-retributivism—obviously those of the libertarian, but also those of either the formal compatibilist or informal desert theory sort. Convictions premised on conventional understandings of free will could be read as consistent with determinations either of a philosophically defensible responsibility-bearingness in a world of universal causation or, among those who kept formal compatibilist principles at arm's length, simply of the just deserts now commonly thought the right of the defendant to the dignity of being respected as a "person." No one, of course, put the matter quite this way; no one engaged in self-conscious re-reading of jury verdicts. I am no more than speculating about the bases for what I take to be an ease with a process (jury determinations of criminal guilt) that scholars well knew to be premised upon assumptions about free will they did not literally share. If I am right, it follows that the practical distance between the conventional morality of guilt assessment and late-in-century elite theories regarding retributive *punishment* was not always very great. And that might help to explain why something close to intentional legitimation of the jury—rather than mere acquiescence in it—was standard fare from the 1970s on.

But this facial convergence between elite theory and jury practice raises numerous questions worth further exploration. At issue is the possibility that most people (e.g., jurors) associate acting under the conditions for legal responsibility posited by compatibilists such as Morse with acting in accordance with true, contra-causal "free will."[26] Thus (to be fanciful), imagine that the Morse-inspired judge instructs jurors that they should (1) abandon their usual notion of free will; (2) assume all thought and behavior fully determined; and (3) nonetheless treat the "capacity for rationality and absence of legally relevant hard choice" as sufficient for criminal responsibility. Might the jurors be a bit perplexed and even, perhaps, doubtful about the law's grasp of human behavior (not to mention about the basic morality of criminal law)? My central questions are: assuming no such charge is given and the jury undertakes a determination of guilt or innocence that facially comports with Morse's criteria—while all the time (unselfconciously, automatically and silently) equating the conditions in Morse's test with contra-causal free will in a

[26] Cf., Greene and Cohen (2004), arguing that evidence of determinism from developments in cognitive neuroscience have the potential to convince the public to loosen its grasp on the notion of free will in favor of consequentialism, and Morse's response (2008), urging that "human beings will find it almost impossible not to treat themselves as rational, intentional agents" (pp. 32–33), whatever science proves, and reiterating his conclusion that such rationality survives determinism and, at base, it is all the conventional notion of "free will" actually requires in support of desert-based responsibility/punishment.

way Morse would not—does that matter? Would a compatibilist charge lead to different determinations of responsibility than would otherwise be forthcoming? Would it matter simply and only because the conviction or acquittal was based on a misconception about the nature of human behavior, assuming it was? Finally, does the position of the informal desert theorists—who were more agnostic about free will and philosophical compatibilism—safely avoid these issues altogether?

Along these last lines, and perhaps less controversially, the relatively enhanced position of the modern criminal trial jury might also be explained by the interaction of rights theory (political liberty) and ideas about respect for the dignity and autonomy of the person that had come to justify attributing blame on the basis of an essentially heuristic idea of free will. By the same token, however, it was—as always—widely understood that one must guard against the possibility of the jury becoming the bearer of rights-*denying* prejudices, of perverted forms of guilt attribution. Thus even in the era of its most intense legitimation, the twentieth century jury was nonetheless conceived of as a mainly fact-finding institution. At the margins, where justice would not tolerate condemnation even of one guilty of the fact, the jury was sometimes accorded a legitimate (if not formally expressed) law-finding ("nullifying") role,[27] because, after all, blameworthiness was not simply a professional legal abstraction, but was tested by lay intuitions and by conscience, a variable matter. Indeed, we should be surprised if neo-retributivism did not legitimate the jury—within bounds, of course: the "law," as such, must not be delegitimated in the process.

But—as suggested—there was more to it than that. Neo-retributivism often openly rejected, or conceded agnosticism regarding, the free will assumption thought to underlie conventional social attribution of desert-based responsibility and punishment. So, of course, did much 1950s scientific positivism and 1960s negative (or "limiting") retributivism, but they were associated with largely benign rehabilitative punishment—in theory—so that the unanswerable question could remain unanswered. *In theory*, it was, ultimately, little skin off the convict's back. Retributive punishment, however, required

[27] In *United States v. Dougherty* (1972), the U.S. Court of Appeals, D.C. Circuit, held that defendants in criminal cases do not have a right to a "nullification instruction." The Court conceded that jury nullification was consistent with the rule of law, but stated that its legitimacy was premised on jurors availing themselves of the power without being told they might do so—the circumstances of the case being so compelling that jurors found it impossible, morally, to convict. This was a Vietnam War protest case; the Court's opinion mainly focused on political cases. Bazelon dissented, as he deemed a nullification instruction critical to his conception of the role of the jury (summarized above, note 21), not only in political cases but also in insanity cases and all other cases raising difficult issues of responsibility.

Bazelon invoked two forms of nullification, that I would describe as freedom-affirming and freedom-denying, without distinguishing them: for him, the jury had an ultimate moral duty to test the attribution of criminal responsibility in accordance with its conscience; different situations test conscience on differing bases, but all criminal cases put responsibility to the test. We might suppose that in most political cases nullification (via acquittal) is freedom-affirming: the jury supports, or at least doesn't condemn, the defendant on grounds of his or her having made a (presumably) free moral decision to break the law. Freedom-denying nullification, on the other hand, occurs when the jury goes outside the law to register doubts about the defendant's capacity to have acted freely in the first place. The nullification literature of the late-twentieth century paid little attention to differences between freedom-affirming and freedom-denying contexts. Some might think that the freedom-affirming variety more directly challenges the rule of law—because such acquittals, where the defendant is nonetheless thought to have "freely" committed each element of the offense, can be used to reject any criminal charge and thus can nullify the enforcement of state-defined crimes—but that freedom-denying cases are one-offs, more easily understood as rare exceptions for rare circumstances. Others might think that freedom-denying cases pose more of a threat because they cut too close to the bone by challenging the underlying basis of *mens rea* that upholds the rule of law; though rare in the eyes of the jury (and of conventional morality, more generally), such cases are grist for those elites who deny free will *tout court* and are skeptical about criminal responsibility, especially desert-based responsibility.

something more in the way of an answer. The question that some neo-retributivist academics conceded was unanswerable in principle was answered in practice by conventional morality. Thus did agnosticism cede, to the criminal trial jury, the practical working out of an "answer" with which society could live. It was not, as it happened, deemed necessary (or wise) to instruct the jury that its answer is given to an unanswerable question. Neo-retributivism thus largely, if unwittingly, accepted a version of Bazelon's approach: the scope of human freedom—case-by-case, context-by-context—was whatever response the conscience of the community would bear; only here, the test was not the relatively easy one wherein what the convict merits is blame and rehabilitation, but the more difficult one wherein what he or she merits is blame and true punishment. What Wechsler had termed the "retaliatory passions" were, all in all, up to the task. In the real world, as well as within the compromised realms of academic thought across the entire twentieth century, this was, in a sense, the actual condition of things. A long succession of scholars all surrendered the question of what free will would mean *in practice*, whether or not they deemed the question answerable in theory. Neo-retributivism, however, signaled a more thoroughgoing acceptance of the jury's role as a black box that operated within a universe at midnight. That was a new departure, but not necessarily a cynical move—however harsh real-world penal practice had become. There was sufficient justification, according to neo-retributivist insights, to sustain the still significant—albeit less dramatic—disjunction between elite theories of responsibility and social-legal conventions regarding more literal (or "strong") free-will-based desert.[28]

Conclusion

The foregoing excursus reveals the centrality of political liberty in any *longue durée* history of the criminal trial jury that seeks to trace juristic-elite ideas about criminal responsibility. Free will concerns, on the other hand, remain in the shadows until relatively recent times, at least so far as one can tell. I have emphasized the importance of the arrival of scientific (or sociological) positivism on American shores in the late-nineteenth century; that arrival, commonly understood to have ushered in a new age in criminal justice administration and in thinking about responsibility, also, I suspect, cast the jury in a new light, and in the process altered the trajectory of the relationship between ideas about the jury and ideas about responsibility. Formerly, juristic elites registered concern with the threat that jury independence posed to the rule of law. By the early-twentieth century,

[28] I am being no more than tentative in my comments on the relationship between neo-retributivist thought and conventional morality (as I am using that term). Much scholarship, at least since P. F. Strawson's "Freedom and Resentment" (1961), has looked to the implications for criminal responsibility of the way most people perceive others' actions and form moral judgments about those actions. American scholars differ in the use they make of these observations about commonplace perceptions and judgments; some seem nearly to take "is" for "ought," others take "is" as good reason for thinking an otherwise derived "ought" all the more plausible. What interests me is the manner in which, over the long term, pervasive social conventions have "seeped up" either to official law-making (I have suggested something like this with respect to the evolution of gradation in the English law of felony during the thirteenth through eighteenth centuries) or to elite theorizing regarding criminal responsibility (one possible way of thinking about the twentieth century American experience). With respect to the latter, some scholars have, as noted, interpreted conventional morality narrowly: following Strawson, they have emphasized the conventional participant attitude toward another—whose act is understood as both intentional and undertaken by one with capacity for reasoned behavior—and have not focused on the possibility of an underlying association of such actions with contra-causal free will. Others (e.g., Weinreb (1986) and Boldt (1992)) have focused on that very possibility.

American juristic elites—though now legal scholars and other commentators rather than judges and treatise writers—sometimes viewed the jury as too loyal to a rule of law that was premised upon outmoded and erroneous notions regarding human responsibility. The constitutional role of the jury as a necessary safeguard against a potentially tyrannical state had to be respected, and at times it could be understood as a buffer against a too-broad conception of responsibility. But the conservatism of conventional morality, according to much learned commentary, mainly held an archaic law in place. Not until the later-twentieth century did elites begin again more fully to endorse the jury as playing a constructive part in a rule of law rooted in defensible principles; but, ironically, many did so on terms that likely differed from the conventional moral terms underlying actual jury decision-making.

As I've suggested, the free will issue might have played a role in shaping the law—as well as in the resolution of actual cases—long before it became a significant part of elite responsibility theory. Conventional morality itself, though premised upon the assumption of human capacity for responsible choice of a sort that accords with actual free will, embodied commonplace notions regarding the limits of such freedom. These imputed limits need not have made a great deal of difference to the resolution of the vast majority of cases, but as it happened, the great over-breadth of the capital sanction in medieval and early-modern England activated such notions and the form of contemporary criminal process allowed them to be determinative in some—possibly many—cases.

In addition to the questions already posed here, there remain many questions to which historians as yet have no answer (and which might prove forever unanswerable). With regard to the early English juries, for example, from what sources did jurors draw their ideas regarding criminal responsibility—meaning, the manifestation of thought and act that merited legal execution: the bench, religious teachings, community custom?[29] Was there, in fact, as I suggest, an interplay over time between jury-based ideas regarding responsibility and those of the legal classes, including the bench? If so, did the law come to absorb pervasive notions about the appropriate limits of the capital sanction because those notions seemed compelling on responsibility terms per se or because of practical concessions that we might describe as simple acquiescence—the stuff of which political liberty traditions are made?[30] In this vein, I have stressed the possible effects of historical jury behavior mitigating conviction and punishment. Is it also possible that juries' willingness to let the

[29] Elizabeth Kamali's contribution to this symposium marks a major step forward (Kamali 2014).

[30] Douglas Hay explored closely related themes in his seminal article, "Property, Authority and the Criminal Law" (1975). Focusing on the pardon in the eighteenth century, Hay noted: "The pardon allowed the bench to recognize poverty, when necessary, as an excuse, even though the law itself did not" (p. 44). Hay draws attention to the political and social features of this display of mercy (which, he argues, engendered respect for the law and deference to the ruling classes). Post-trial pardon process of course differed in vital respects from trial-stage process. Judicial acquiescence in jury verdicts that, in effect, accorded defendants extra-legal excuses can be understood in Hay's terms—to a point; but, as he would likely agree, the dynamics of judge-jury relations and the apparent manipulation of the law by the jury, among other matters, made for quite different legal, political, and social readings. The availability, at the pardon stage, of extra-legal forms of excuse might be viewed as a forerunner of modern bifurcation of guilt assessment and sentencing. Jury recourse to such excuses at trial—with or without judicial encouragement or, at least, acquiescence—seems quite different. On the other hand, the historian might view the early-modern (and earlier) English criminal trial as a joint guilt-assessment/sentencing process, in which case post-trial pardoning (or reprieve leading to transportation) does not appear very different from trial process itself. Just what contemporaries thought about trial-based mitigation is yet another matter. There remains, at least, the possibility of jurors and outside observers conflating a sentencing phenomenon with application (or nullification) of the law at guilt assessment. Clearly, there is room for further analysis of contemporary understandings of the trial and of jury behavior with respect to the history of criminal responsibility.

most serious offenders hang reinforced retributivism among the bench and thereby delayed a purely consequentialist—as opposed to mixed—judicial justification for punishment? On the American side, the constitutional basis for the jury trial (which, for contemporary commentators, has been either an irritating given with which one has to deal or something a good deal more positive) embodies an institutional expression of political liberty that has, in turn, eased the way for conventional morality's move from mere convention, to incidental support for elite theory, to critical justification of theory. Here, I want to emphasize that the evolving relationship between elite and common understandings is, at present, as opaque as it was in the past. We theorists might ask of ourselves some of the same questions we would ask about jurists and legislators of earlier times: one wonders, do we take control of conventional morality as we make use of it? Or does it hold our thought in place (even, shape it), control, and make use of us?

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